Supreme Court, U.S.
FILED
93 1310 FEB 10 1994

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1993

BEVERLY DELL WEST, and
ROBERT WESLEY WORTHEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals may declare this case to be a "rare case" exception to this Court's clear direction regarding statutory interpretation and substitute its own "common sense" notion in place of statutory language acknowledged as clear and unambiguous without first finding clearly expressed legislative history to support such a departure.

2. Whether the "suspension of running of period of limitation" found in 26 U.S.C. §6503 may be activated by 11 U.S.C. 108(c) to toll and add six months to the 240-day priority period of 11 U.S.C. §507(a)(7)(A)(ii) when that period is interrupted by a pending bankruptcy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Beverly Dell West and Robert Wesley Worthen, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 5 F.3d 423, and is reprinted in the appendix, p.1a, *infra*. The decisions of the United States District Court for the District of Oregon are reported at *In re West*, 137 B.R. 1012 (D.Or. 1992)

and *In re Worthen*, 137 B.R. 1016 (D.Or. 1992). The letter opinion of the bankruptcy court is not reported but is reprinted in the appendix, *infra*, p.11a.

JURISDICTION

The judgment of the court of appeals, reprinted in the appendix, *infra*, p.13a, was entered on September 21, 1993. A timely Petition for Rehearing was filed by petitioners. An Order denying petition for rehearing, reprinted in the appendix, *infra*, p.15a, was entered on November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549

11 U.S.C. §108 Extension of time

* * *

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. §507(a)(7)(A) Priorities

(a) The following expenses and claims have priority in the following order:

(7) Seventh, allowed unsecured claims of governmental units; only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition;

Internal Revenue Act of 1986

26 U.S.C. §6502 Collection after assessment

(a) Length of period.

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, ...

1990 Amendment. Subsec. (a)(1). Pub.L. 101-508, §11317(a)(1), substituted "10 years" for "6 years".

26 U.S.C. §6503. Suspension of running of period of limitation

* * *

(b) Assets of taxpayer in control or custody of court.

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(h) Cases under title 11 of the United States Code.

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

STATEMENT OF THE CASE

1. Section 1322(a)(2) of the Bankruptcy Code requires that a Chapter 13 plan must provide for full payment of all claims entitled to priority. Section 507 of the Bankruptcy Code establishes the classification and order of priority for certain expenses and claims. Section 507(a)(7)(A)(ii) specifically requires the passage of 240 days before certain priority tax claims lose their priority classification. Thus tax claims assessed less than 240 days from the filing of a Chapter 13 petition must be paid in full through the plan, and tax claims assessed more than 240 days from the filing, unless there has been an intervening offer in compromise, lose their priority and are paid pro rata along with all other nonpriority claims.

2. Petitioners, Robert Wesley Worthen and Beverly Dell West (then Beverly Dell Worthen) filed a joint bankruptcy petition under Chapter 13 of the Bankruptcy Code on January 19, 1989 seeking to discharge, *inter alia*, joint personal tax liabilities for tax

years 1982, 1983 and 1984. The assessments for those tax years had occurred on June 13, 1988, 220 days prior to the filing of the joint petition, thus rendering those tax years priority for the purposes of that bankruptcy.

On May 16, 1990, petitioners filed a Motion to Dismiss the joint petition pursuant to 11 U.S.C §1307(b). That motion was granted and that case dismissed by Order on May 30, 1990, 496 days after its filing. Petitioners subsequently divorced. On July 27, 1990, petitioners filed individual bankruptcy petitions, each in their own names, under Chapter 13 of the Bankruptcy Code. Each Chapter 13 plan provided that the claims for tax years 1982, 1983 and 1984 were nonpriority since more than 240 days had passed since their assessment. The government filed objections to confirmation of both plans, arguing that since the stay provisions of 11 U.S.C. §362 prohibited any action on its part during the joint bankruptcy, the interruption of the 240-day priority period of 11 U.S.C. §507(a)(7)(A)(ii) served not only to toll the running of that period, but to graft an additional 183 days (6 months) to its length by incorporating 26 U.S.C. §6503(b) to the Bankruptcy Code through 11 U.S.C. §108(c).

3. On August 21, 1991, the bankruptcy court overruled the government's objections, (App., *infra*, p.12a), concluding that the tax claims for tax years 1982-84 had lost their priority. The bankruptcy court reasoned that since the government had more than 240 days to collect on its claim after assessment, the government had not been deprived of the 240-day period and these tax years were properly included in the plans as nonpriority.

4. The district court reversed. That court first found that the plain language of the statutes supported the contentions of the petitioners. The court stated that "... section 108(c) does not apply to this action because section 6503(b) is not a nonbankruptcy law applicable to the priority status set out in section 507(a)(7)(A)(ii) of the Bankruptcy Code." *West*, *supra*, at 1020. The court nonetheless held that not only should the 240-day priority period be tolled during the period of the joint petition, but the government should also be granted the additional 183 days for which it argued, citing *In re Brickley*, 70 B.R. 113 (9th Cir BAP 1986). Simple tolling of the 240-day priority period would have resulted in these tax claims being classified nonpriority since 278 non-tolled days had passed since assessment. (220 days pre joint petition, plus 58 days between dismissal of joint petition and filing of individual petitions) However, tolling and the addition of 183 days meant that the individual Chapter 13 plans would need to be filed more than 919 days after assessment before the tax claims would lose priority. (240 days required by statute, plus tolled period of 496 days, plus 183 days additional period) This gross addition, adopted by the district court, classified the tax claims at issue as priority since only seven hundred seventy four days had now passed between the assessment and filing of the individual Chapter 13 plans.

5. The court of appeals affirmed, acknowledging and adopting the reasoning of *In re Brickley*, *supra*. It held that the petitioner's joint Chapter 13 case tolled the 240-day priority period from the date of that petition until 6 months after the case was dismissed. (App. *infra*, p.10a). The court found that even though the government had 278 days after assessment in which to collect its taxes "without hinderance from a pending

bankruptcy", it was "logical to also apply §6503's six-month extension period" to the 240-day priority period by invoking the suspension provision of 11 U.S.C. §108(c) (*Id.* at 9a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision to use "common sense" not only to toll the 240-day priority period of 11 U.S.C. 507(a)(7)(A)(ii) but to also add an additional six months to that time period, directly conflicts with applicable decisions of the Court, other courts of appeals, the clear unambiguous statutory language and legislative history of the Bankruptcy Code, and confuses the proper administration of the revenue laws.

The court of appeals has decided a significant bankruptcy law issue in a manner that directly conflicts with the decisions of other court of appeals. Moreover, the court's decision is erroneous because it unjustifiably disregards the plain language of the governing statutes, all the while acknowledging that there is no clearly expressed legislative history to support such a departure. The court of appeals has nonetheless substituted its own "common sense" notion to reach a result demonstrably at odds with that plain language. The question presented is of considerable importance to the Constitutional separation of powers. Accordingly, it is appropriate for this Court to grant certiorari in order to halt the judicial legislation sanctioned by the court of appeals, and to eliminate the uncertainty and disparity in treatment in different circuits that has been created by the court of appeals' error.

The statutes involved are clear and unambiguous. Section 507(a)(7)(A)(ii) of the Bankruptcy Code, as written, is silent regarding any tolling of the 240-day priority period during the pendency of a bankruptcy filed within that period. Section 108(c) of the Bankruptcy Code, as written, provides only for the extension of times found in "applicable nonbankruptcy law," and not for extension of periods within the Code. Section 6503(b) of the Internal Revenue Code provides only for the tolling and addition of 6 months to the period of limitation specifically prescribed in §6502(a) of the Internal Revenue Code and not priority periods found within the Code. Section 6502 provides that the government must complete collection by levy or proceeding in court within 10 years after assessment. Three courts of appeals are in conflict as to whether the 240-day priority period may be tolled, and, if tolled, whether an additional 6 months is added to its length.

The decision of the court of appeals conflicts with *In re Richards*, 994 F.2d 763 (10th Cir. 1993) which chose simply to toll the 240-day priority period during the pending bankruptcy with no additional 6 month period. The factual basis in *Richards* is essentially indistinguishable from that of the instant case with the exception that the government had less than 240 days after assessment to collect without hinderance from the pending bankruptcy. In *Richards*, the debtor filed his first petition for bankruptcy under Chapter 13 ninety-six days after assessment of the tax claims in question. After having been in bankruptcy for 219 days, the debtor voluntarily dismissed his petition. Fifty-one days later, the debtor filed a second Chapter 13 petition. The government objected to the treatment of the tax claims in question as nonpriority in the second petition, arguing that the 240-day priority period was tolled

during the pendency of the first bankruptcy. If the period was tolled, only 147 non-tolled days had passed since assessment.

The government, recognizing that §108(c) of the Bankruptcy Code could not support tolling, advanced instead the provisions of §105(a) of the Bankruptcy Code. That section grants a bankruptcy court the power to "issue any order, process or judgment that is necessary to carry out the provisions "of the Code, and to take "any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

The Tenth Circuit, acknowledging the clarity and unambiguity of the statutes involved, adopted and applied §105(a) to justify simple tolling after first stating, "In this court the IRS concedes, as it must, that there are no sections of the Bankruptcy Code which expressly provide that in the case of successive petitions in bankruptcy, the 240-day period will not run during the pendency of the first bankruptcy." *Id.* at 765.

The petitioners would prevail in the Tenth Circuit under the holding of *Richards*. Tolling pursuant to §105(a) without the additional six month period would result in the tax claims in the instant case being classified as nonpriority since 278 non-tolled days passed after assessment. Thus, the decision below and the decision in *Richards* will lead to disparate results in the Ninth and Tenth Circuits whenever there is an intervening bankruptcy and the addition or not of the six-month period will make the difference between tax claims being classified as priority or nonpriority.

Even though petitioners would prevail under *Richards*, they quarrel with its rational. This Court and virtually all circuits, agree that equitable principles cannot be used to disregard and override the clear and unambiguous statutory language found within the Bankruptcy Code. *Northwest Bank Worthington v. Ahlers, et. ux.*, 485 U.S. 197, 206 (1988); *Matter of Grissom*, 955 F.2d 1440, 1449, n.8 (11th Cir. 1992); *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2nd Cir. 1990); *In re Plaza De Diego Shopping Center, Inc.*, 911 F.2d 820, 830-31 (1st Cir. 1990); *In re C-L Cartage Co., Inc.*, 899 F.2d 1490, 1494 (6th Cir. 1990); *In re Morristown & Erie R. Co.*, 995 F.2d 98, 100 (3rd Cir. 1989); *In re Kelly*, 841 F.2d 908, 913, n.4 (9th Cir. 1988); *United States v. Sutton*, 796 F.2d 1305, 1307-8 (5th Cir. 1986); *Johnson v. First Nat. Bank*, 719 F.2d 270, 273-75 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1983). Moreover, *Richards* used the equitable powers of §105(a) to prejudice the debtors for serial filings in complete derogation of §349(a) which states, in part, "... nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title ..."

The decision of the court of appeals also conflicts with the recent Fifth Circuit case of *In re Quenzer*, unpublished, (5th Cir. 1993)[1], reprinted in the

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[1] Fifth Circuit Local Rule 47.5.3 provides: "Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an

appendix, *infra*, p.16a. *Quenzer* reversed the district court's reliance upon §108(c) of the Bankruptcy Code for the tolling of §507 priority periods during a prior bankruptcy proceeding. The Fifth Circuit refused to toll or add additional time to the priority periods found within the Code by employing the statutory suspension power of §108(c). The Fifth Circuit recognized that under the plain language of §108(c), "that suspension applies only to nonbankruptcy law and nonbankruptcy proceedings." (*Id.* at p.18a). The Fifth Circuit acknowledged, as did the Tenth Circuit, the government's "apparent recognition that the plain language of 11 U.S.C. §§507 and 108(c) gives no support to the rulings a 'quo." (*Id.* at p.18a). The Fifth Circuit then examined, at the government's urging, the possible exercise of the equitable powers of §105(a). The Fifth Circuit refused to consider §105(a) since it had not been presented to the trial court, citing, *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649 (1992).

The petitioners would prevail in the Fifth Circuit under the rational of *Quenzer*. The Fifth Circuit's recognition that the plain language of §108(c) applies "only to nonbankruptcy law", would prohibit, in that circuit, the application of that section's suspension power to the bankruptcy law of §507. It was the application of 108(c) to the priority periods found within the Code, that allowed for the addition of 6 months to the priority period for the tax claims in the instant case. Only through the addition of the 6 months could the government prevail. Thus the decision below and application of the rational in *Quenzer* will lead to

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unpublished opinion is cited, a copy shall be attached to each copy of the brief."

disparate results in the Fifth and Ninth Circuits whenever the 240-day priority period is interrupted by an intervening bankruptcy.

The decision of the court of appeals mistakenly fails to apply the plain terms of these statutes. The natural reading of the statutes involved fails to reveal any language supporting the tolling of the 240-day priority period or the grafting of additional time to it. The court of appeals departs from the basic rule of statutory construction cited numerous times by this Court. That rule states that when the terms of a statute are unambiguous, judicial inquiry is complete, except in the exceptional and "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1982)); See also, *e.g.*, *Patterson v Shumate*, 504 U.S.____ (1992); *Toibb v. Radloff*, 501 U.S.____ (1991); *Burlington Northern R. Co. v. Oklahoma Tax Com'n.*, 481 U.S. 429, 461 (1987). This basic rule applies with particular strictness when dealing with a taxing act. *Crooks v. Harrelson*, 51 U.S. 49, 50 (1930).

Before any judicial inquiry into legislative history may begin, there must be an absurdity in a reading of the plain meaning of a statute "so gross as to shock the general moral or common sense." *Id.* at 50. The noting of such an absurdity would trigger the notion that the perceived result somehow will be at odds with the intention of Congress. The examination of such a notion by the judiciary must be approached with "great caution and circumspection" least it be abused. As stated by Justice Sutherland, "Courts have sometimes

exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute the meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter." *Id.*

Application of the plain meaning of the statutes involved does not shock the general moral or common sense. Here, the government had well more than the Congressionally allotted 240 days in which to begin its collection process. It is undisputed that 278 days unencumbered by the intervening bankruptcy passed after assessment and before the filing. Nonetheless, the government complained that, due to the interruption in the 240 day period, it needed additional time to restart and refocus its efforts. Even were that need legitimate, Congress has not yet seen fit to so provide in the provisions of the Bankruptcy Code. Speculation that Congress may not have foreseen all consequences of its statutory enactment and might, upon hindsight act differently, is not sufficient grounds for a court to rewrite a statute merely because the current court deems it susceptible of improvement. *Badaracco v. Commissions*, 464 U.S. 386, 398 (1984); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Because the government dislikes a particular result or wishes to escape consequences thought to entail a perceived hardship does not render it absurd. *Deputy v. Dupont*, 308 U.S. 488, 498 (1940). This is especially true when, as here, the judiciary attempts to decide if some time period or date other than the one found specifically in the statute is the time period or date actually intended

by Congress. *United States v. Locke*, 471 U.S. 821, 93 (1985). This Court cannot allow the court of appeals "to set sail on (such) an aimless journey." *Id.* at 93. The government's remedy lies with Congress, not the judiciary. *Crooks*, *supra.*, 51 U.S. at 51.

To support any departure from literal application, this Court has required even after a showing of an absurd result, an "exceptionally heavy" burden of persuasion that Congress did not intend the result brought by that literal application. *Patterson*, *supra.*, 119 L.Ed.2d 519, 528; *Union Bank v. Wolas*, 502 U.S. ___ 116 L.Ed.2d 514, 521 (1991). Since all courts reviewing these issues agree that the clear and unambiguous language of the statutes involved do not allow for the tolling or addition of time to the 240-day priority period, the crux of this case is whether, notwithstanding the clarity, is it appropriate to examine the legislative history and, if examination is appropriate, whether there is sufficient "clearly expressed" legislative history to demonstrate intention on the part of Congress to permit a departure from the statutes' plain meaning. This Court has wisely been reluctant to invoke this "rare case" exception as it flirts with the dangerous and rocky shoals of judicial legislation, a concept of which this Court has long been wary. *Springer v. United States*, 102 U.S. 586, 594 (1881); *Kirschbaum v. Walling*, 316 U.S. 517, 522 (1942); *TVA v. Hill*, 437 U.S. 153, 194-195 (1978); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (quoting *Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977); *United States v. James Daniel Good Real Property*, (114 S.Ct. 492, *511, 1993 WL 505539, **18 (U.S. Hawaii)). The case at bar is not one of those rare cases.

In support of its "rare case" departure, the court of appeals is able to cite only *Bob Jones University v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, the plain purpose of the statute involved was to give tax exempt status to certain religious, charitable or educational organizations. Because Bob Jones University denied admission to applicants engaged in or advocating interracial marriage or dating, the IRS revoked the University's tax-exempt status. The IRS took that measure despite the fact that a literal reading of the tax-exempt statute would have granted continued exemption to the University. The school appealed and this Court affirmed the action of the IRS. In doing so, this Court found overwhelming, compelling and "unmistakable evidence" that the action of the IRS was supported by years of previous declarations of Congress, the Executive and the courts.

This Court in *Bob Jones* discovered crystal clear evidence of statutory purpose and Congressional intent demonstrated by, *inter alia*, the fact that during the 12 years after the withdrawal of tax-exempt status for the University, 13 bills had been introduced to overturn the IRS interpretation of tax exemption for University. Not one of those bills emerged from committee despite numerous amendments to the tax exempt statutes during that same period. The Court found more evidence in the fact that Congress passed other bills denying tax-exempt status to other organizations that similarly discriminated. Compelling evidence in the Congressional record, pronouncements by the Executive branch and courts articulating a strong national policy against racial discrimination supported a clear statutory purpose to deny Governmental support to such organizations. *Id.* at 2033.

The court of appeals' reliance on *Bob Jones* is sorely misplaced. While *Bob Jones* demonstrates the "rare case" exception, equation of *Bob Jones* to of the case at bar does enormous disservice to the long history of this country's civil rights struggle. To allow the University to enjoy the benefits of tax-exempt status while nonetheless promoting racial discrimination would be an obviously shockingly absurd result deserving of further inquiry. Such a shockingly absurd result is not remotely present in the case at bar.

The court of appeals has departed from the clear and unambiguous meaning of the statutes involved without reciting any "unmistakable evidence" to suggest that the plain meaning did not reflect the intentions of Congress. Indeed, the court of appeals acknowledged this lack of evidence when it stated, "Although the legislative history is bereft of reasons for granting the extension (the 6 month extension found in §6503) common sense dictates that such a period was given in order to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so." (App., *infra*, pp.9-10a). While this "common sense" might arguably apply to a clearly enunciated ten year statute of limitations outside the Bankruptcy Code, it falls far short of any application to the 240-day priority period found within the Code. The court appeals, being unable to demonstrate any "clearly expressed" legislative history to support its failure to grant the statutes involved their plain meaning, erred by resorting to its own "logical" notion to rewrite these statutes (*Id.* at p.9a). The court of appeals has tortured the "rare case" exception, circumventing the plain meaning of the statutes involved to reach a result it deems more palatable. The case at bar is not a "rare case" exception.

The court of appeals' fatal error was its embrace of *In re Brickley*, *supra*. which is fundamentally flawed. *Brickley* completely side-stepped the analytical prerequisite to statutory interpretation and construction. There was no search nor finding of ambiguity or display of a shockingly absurd result before it proceeded with its defective examination of legislative history in the hope of divining Congressional intent.

Brickley began with an analysis of §108(c) which clearly references "applicable nonbankruptcy law" and provides for the tolling of nonbankruptcy statutes of limitations during a Title 11 proceeding. *Brickley* then reviewed the nonbankruptcy law of §6503 of the Internal Revenue Code which provides only for the tolling of the nonbankruptcy statute of limitations found in §6502(a). The court then queried whether §108(c) could work in conjunction with §6503. After a review of the Senate Report accompanying §108(c) and after answering its query in the affirmative, it proceeded with an astounding leap of logic. It concluded that the suspension applied not only to §6502 but also to the three-year priority period of §507(a)(7)(A)(i) found only inside the Bankruptcy Code.

The *Brickley* court ignored the House Report accompanying §108(c) which clearly reveals that Congress was specifically concerned with tolling of statutes of limitations <u>outside</u> the Bankruptcy Code and not to sections found within. That Report states:

> **Section 108, Extension of time:** The House amendment adopts section 108(c)(1) of the Senate amendment which expressly includes special suspension of statutes of limitation on <u>collection outside bankruptcy</u>

> when assets are under the authority of the court. For example, section 6503(b) (which refers specifically to the six year statute of limitations of §6502 of the Internal Revenue Code) suspends collection of tax liabilities while the debtor's assets are in control or custody of a court, and for 6 months thereafter. By adopting the language of the Senate amendment, the House amendment insures not only that the period for collection of the taxes outside bankruptcy will not expire during the Title 11 proceedings, but also that such period will not expire until at least 6 months thereafter, which is the minimum suspension period provided by the Internal Revenue Code. (Emphasis and parenthetical added.) H. Rep. No. 95-595, 95th Cong., (1978), U.S. Code Cong. & Admin. News 1978, page 6488.

Notwithstanding the decision in *Brickley*, §§108(c) and 507(a)(7)(A)(ii) are clear, unambiguous and produce no shockingly absurd result when applied to the case at bar. Failing to toll or extend the priority periods complies with the spirit of the Bankruptcy Code in facilitating the "fresh start" for debtors. Section 507(a)(7)(A) is not a nonbankruptcy law that "... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court ..." as required by the plain language of §108(c). Section 108(c) is very specific in mandating that the nonbankruptcy statues of limitations to be effected by its directives are "such periods" specifically designated by those nonbankruptcy statues, and no others. Section 507(a)(7)(A) is an applicable bankruptcy measuring period which is not affected by §108(c). It only sets the minimum times

after assessment in which citizens may treat tax claims as nonpriority. The mere fact that §108(c) extends nonbankruptcy deadlines lends no weight to the argument that Bankruptcy Code provisions are also to be suspended.

Sections 6502 and 6503 of the Internal Revenue Code are equally clear and unambiguous. They make no reference whatsoever to the priority periods found within the Bankruptcy Code. Plainly read, these statutes by their interlocking wording simply state that if the government is going to collect certain taxes, it must do so within 10 years after assessment. If during that period, a citizen's assets are unreachable due to a court proceeding, the 10 year collection period is tolled plus six months until the assets are once again subject to levy. These statutes cannot be read to include anything additional. The decision by the court of appeals expanding the clear direction of the statutes involved forces a promiscuous interrelationship not permitted by their clear and express language. The decision by the court of appeals rewrites these statutes, adding language Congress, in its wisdom, chose to omit.

CONCLUSION

The decision below is a marked departure from the well established rules of statutory construction. To allow the decision of the court of appeals to stand, this Court must concede that the scant and generalized legislative history cited by the court of appeal, grants the judiciary license to ignore clear and unambiguous statutory language and contrary specific legislative history supporting the "plain meaning" of these statutes. This Court must further concede that the holdings in numerous opinions rendered by this Court which

require the need for clearly expressed legislative history in order to justify departure from the plain meaning of a statute must be relaxed. To allow this decision to stand would solidify confusion on the part of tax professionals and bankruptcy attorneys who would be left without notice as to which of the three current circuit interpretations will rule their circuit. To allow this decision to stand would allow the court of appeals to usurp the legislative function and rewrite these statutes to reach its desired result. To allow this decision to stand would allow the court of appeals to substitute their "common sense" for that of Congress, a dangerous departure from the Constitutional separation of powers.

The conflict in the circuits created by the decision below warrants this Court's attention because the question presented is of considerable importance to the separation of powers and administration of the revenue and bankruptcy laws. Petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35286

Beverly Dell West,
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

No. 92-35293

Robert Wesley Worthen
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

Appeals from the United States District Court
for the District of Oregon
No. CV-92-60-FR
No. CV-92-59-FR
Helen J. Frye, *Judge*

Argued August 30, 1993 - Decided September 21, 1993

Before: Browning, Schroeder, and Hall, *Circuit Judges.*

Cynthia Holcomb Hall, *Circuit Judge.* Chapter 13 debtors Beverly West and Robert Worthen appeal the district court's reversal of bankruptcy court orders denying priority to tax claims of the Internal Revenue Service. The district court held that the debtors' prior Chapter 13 case suspended Bankruptcy Code s 507(a)(7)(A)(ii)'s 240-day priority period until six months after the debtors dismissed that case. We affirm.

I. Background

On June 13, 1988, the IRS assessed income taxes for the years 1982 through 1984 against Beverly and Robert Worthen. Two-hundred and twenty days later, on January 19, 1989, the Worthens filed a joint petition under Chapter 13 of the Bankruptcy Code. On May 30, 1990, the Worthens voluntarily dismissed their case. They divorced shortly thereafter. On July 27, 1990, fifty-eight days after dismissing their joint case, Beverly West and Robert Worthen filed individual Chapter 13 petitions.

The IRS subsequently filed proofs of claim in the West and Worthen cases for the 1982-1984 income taxes. The debtors each filed Chapter 13 plans that provided for payment of the IRS claims on a pro rata basis with the general, unsecured claims. The IRS objected to confirmation on the ground that Bankruptcy Code s 507(a)(7)(A) required that the plans give priority to the tax claims.

The bankruptcy court overruled the IRS objections, reasoning that the IRS was not entitled to priority because it had assessed the taxes more than 240 days before the debtors' individual petitions. The district court reversed, holding that the debtors' prior bankruptcy case suspended the running of the 240-day priority period until six months after the case was dismissed. 137 B.R. 1012 (D.Or.1992).

II. Statutory Framework

A bankruptcy court may not confirm a Chapter 13 plan unless it provides for "the full payment ... of all claims entitled to priority under section 507" of the Bankruptcy Code. 11 U.S.C. s 1322(a)(2) (1988). *425 Section 507 accords priority, in part, to government claims

for income taxes "assessed within 240 days ... before the date of the filing of the petition." Id. s 507(a)(7)(A)(ii). [FN1]

FN1. "(a) The following expenses and claims have priority in the following order: ...

(7) Seventh, allowed unsecured claims of governmental units, only to the extent such claims are for--

(A) a tax on or measured by income or gross receipts-- ...

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition." 11 U.S.C. s 507(a)(7)(A)(ii) (1988).

Section 108(c) of the Bankruptcy Code provides for the suspension of certain nonbankruptcy statutes of limitation on actions against a debtor in bankruptcy. [FN2] Section 6503 of the Internal Revenue Code, which suspends the limitation period on tax collection against a debtor in bankruptcy until six months after the debtor's case is dismissed, [FN3] is one example of a nonbankruptcy provision within the scope of s 108(c).

FN2. "[I]f applicable nonbankruptcy law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period does not expire until ... the end of such period, including any suspension of such period occurring on or after the commencement of the case." 11 U.S.C. s 108(c)(1) (1988).

FN3. "The running of the period of limitations ... on the making of assessments or collection shall, in a case under [the Bankruptcy Code], be suspended for the period during which the [IRS] is prohibited by reason of such case from making the assessment or from collection and ... [for] 6 months thereafter." 26 U.S.C. s 6503(h)(2) (Supp.1990).

The IRS may not collect tax claims against a debtor in bankruptcy unless it obtains relief from the automatic stay. See 11 U.S.C. s362(a)(6) (1988). Because such relief is rarely granted, the IRS usually is "prohibited by reason of such case" from collecting taxes until the bankruptcy petition is dismissed. Under s 6503(h)(2), therefore, the collection limitation period usually does not begin to run until six months after dismissal.

III. Contentions of the Parties

The debtors concede that, because the IRS assessed the taxes at issue within 240 days before their joint Chapter 13 petition, the tax claims in that case would have been entitled to priority under s 507(a)(7)(A). The debtors assert, however, that priority status in their individual cases is inappropriate because 774 days had elapsed between the time of assessment and the date on which they filed their individual petitions. The bankruptcy court agreed.

The IRS argues that, read together, the Bankruptcy and Internal Revenue Codes suspend s 507(a)(7)(A)'s priority periods from the time a debtor files for bankruptcy until six months after the case is dismissed. The IRS concedes that s 108(c), which incorporates only nonbankruptcy law, does not facially apply to suspend the bankruptcy law priority periods. It urges, however, that s

108(c)'s incorporation of s 6503's suspension and extension illustrates a statutory purpose to preserve the collectibility of certain tax claims and that, as a result, the suspension and extension must also apply to the priority periods. The district court agreed and reversed the bankruptcy court.

IV. Discussion

We review de novo the district court's statutory interpretation. E.g., Careau Group v. Juan De La Cruz Farm Workers Pension Fund (In re Careau Group), 923 F.2d 710, 711 (9th Cir.1991).

To begin, we note that interpretation of the Bankruptcy Code "begins where all such inquiries must begin: with the language of the statute itself." United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (interpreting s 506(b)). E.g., Patterson v. Shumate, --- U.S. ----, ----, 112 S.Ct. 2242, 2248, 119 L.Ed.2d 519 (1992) (interpreting s 541(c)); Toibb v. Radloff, --- U.S. ----, ----, 111 S.Ct. 2197, 2200, 115 L.Ed.2d 145 (1991) (interpreting s 109(d)). Nevertheless, we realize that "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' ..., the intention of the drafters, rather than the strict language, controls." Ron Pair, 489 U.S. at 242, 109 S.Ct. at 1031 (quoting Griffin v. Oceanic Contractors, *426 Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). [FN4]

FN4. "[A] court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute: '... the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the

whole statute ... and the objects and policy of the law....' " Bob Jones Univ. v. United States, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 184, 15 L.Ed. 595 (1857) (emphasis added)).

[1] The case at bar is one such "rare case." Because literal interpretation of s 108(c) would frustrate the Bankruptcy Code's intricate scheme for the payment of tax claims, we do not adopt the debtors' "plain language" admonitions.

[2] Section 507(a)(7) creates a "delicate balance" between priority and discharge of tax claims. In re Official Comm. of Unsecured Creditors of White Farm Equip. Co., 943 F.2d 752, 757 (7th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1292, 117 L.Ed.2d 115 (1992). [FN5] The statute's legislative history reveals that, as part of this balance, "Congress intended to give the government the benefit of certain time periods to pursue its collection efforts." United States v. Richards (In re Richards), 994 F.2d 763, 765 (10th Cir.1993). "[T]he tax collector ... should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting." S.Rep. No. 989, 95th Cong., 2d Sess. 14 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5800. [FN6]

FN5. For example, priority claims are not discharged in Chapter 13 until paid in full. 11 U.S.C. ss 1322(a)(2), 1328 (1988). Nonpriority claims, however, may be discharged upon pro rata payment with general, unsecured claims. Id. s 1328.

FN6. The House Report evinces a similar concern: "An open-ended dischargeability policy would provide an opportunity for tax evasion through bankruptcy, by permitting discharge of tax debts before a taxing authority had an opportunity to collect any taxes due." H.R.Rep. No. 595, 95th Cong., 1st Sess. 190 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6150.

[3] By incorporating the suspension provisions of the Internal Revenue Code, s 108(c) reflects a policy determination that " 'it would be unfair to allow the statute [of limitations] to run against the government's right to enforce a tax lien when, even if the government did bring suit, it couldn't collect because it couldn't 'get at' the taxpayer's assets.' " Molina v. United States (In re Molina), 99 B.R. 792, 794-95 (S.D.Ohio 1988) (quoting United States v. Verlinsky, 459 F.2d 1085, 1087 (5th Cir.1972)). [FN7] Interpreting s 108(c) literally would allow a debtor to create an "impenetrable refuge" by filing a bankruptcy petition, waiting for s 507(a)(7)'s priority periods to expire, and then dismissing the case and refiling shortly thereafter. Florence v. IRS (In re Florence), 115 B.R. 109, 111 (S.D.Ohio 1990). [FN8]

FN7. Contrary to the debtors' assertions, tax claim collection and priority are intimately related. The sole function of assigning priority to certain tax claims is to enhance the government's ability to collect those claims.

FN8. Such an interpretation would also be inconsistent with the maxim contra non valentem agere, non currit praesciptio ("the prescription does not run against one unable to act"). See 51 Am.Jur.2d Limitations on Actions ss 138-77 (1970).

Given the clearly-expressed statutory purpose of providing the IRS with a specific period of time within which to collect taxes, "[s]uch a result is neither required by, nor consistent with, a holistic interpretation of the Bankruptcy Code." Id. This is particularly true in light of the established policy that" 'limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government.' " Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386, 392, 104 S.Ct. 756, 761, 78 L.Ed.2d 549 (1983) (quoting Lucia v. United States, 474 F.2d 565, 570 (5th Cir.1973)). In the first case to address this issue, Brickley v. United States (In re Brickley), 70 B.R. 113 (9th Cir.1986), the Ninth Circuit Bankruptcy Appellate Panel reached the same conclusion. The Brickley panel reasoned that a literal reading of s 108(c) "would render the extension of the statute of limitations ... without meaning, since tax collectibility is obviously useless if the tax debt has been discharged." Id. at 115. *427 Nearly every other court that has analyzed the issue has followed Brickley. [FN9] Most recently, the Tenth Circuit applied a different analysis but reached the same conclusion. See Richards, 994 F.2d at 765-66 (affirming the bankruptcy court's use of s 105(a) to suspend the 240-day priority period during the course of the debtor's prior bankruptcy). We find Brickley persuasive and adopt its reasoning.

FN9. See Montoya v. United States (In re Montoya), 965 F.2d 554, 555-58 (7th Cir.1992); Linder v. United States (In re Linder), 139 B.R. 950, 952-53 (D.Colo.1992); United States v. Deitz (In re Deitz), 116 B.R. 792, 794 (D.Colo.1990); Molina, 99 B.R. at 794-95; Stoll v. IRS (In re Stoll), 132 B.R. 782, 784-85 (N.D.Ga.1990); In re Ross, 130 B.R. 312, 313-14 (D.Neb.1991); In re Wise, 127 B.R. 20, 21-23 (E.D.Ark.1991); In re Ringdahl, [1990-91] Bankr.L.Rep.

(CCH) P 74,082, 1991 WL 284105 (Bankr.M.D.Fla.1991); In re Bryant, 120 B.R. 983, 984-85 (E.D.Ark.1990); In re Davidson, 120 B.R. 777, 781-87 (D.N.J.1990); Florence, 115 B.R. at 110-13; In re Quinlan, 107 B.R. 300, 301 (D.Colo.1989); In re Ryan, No. 88-B-07735-A, 1989 WL 155684 (Bankr.D.Colo.1989). Although Brickley and several of these cases actually address the three-year priority period of s 507(a)(7)(A)(i), the analysis applies with equal force to the 240-day priority period. See Richards, 994 F.2d at 766 (applying cases construing the three-year period to analyze the 240-day period).

[4] The debtors contend that, even if the 240-day period stopped running during their prior bankruptcy, the IRS is still not entitled to priority because it actually had 278 days after assessment in which to collect the taxes without hindrance from a pending bankruptcy case (220 days prior to the joint petition plus fifty-eight days after dismissal and before the individual petitions). We disagree. Because we look to Internal Revenue Code s 6503, incorporated through Bankruptcy Code s 108(c), to suspend the priority period, we think it logical to also apply s 6503's six-month extension period. [FN10]

FN10. Every other case that has mentioned the six-month extension has reached the same conclusion. See Montoya, 965 F.2d at 557; Deitz, 116 B.R. at 794; Ross, 130 B.R. at 313; Wise, 127 B.R. at 23. In Deitz, as in the case at bar, the additional six-months was the determining factor in whether the tax claims were entitled to priority.

The six-month extension illustrates a legislative recognition that interruption in collection activity necessitates additional time once the IRS is again free to pursue tax debtors. Although the legislative history is bereft of reasons for granting the extension, common

sense dictates that such a period was given in order to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so. The legislative history of s 108(c), which incorporates s 6503, implicitly acknowledges this purpose:

> [Section 108(c) is] designed to minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings....
>
> [T]he statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the [IRS] adequate time to collect nondischargeable taxes following the end of the [bankruptcy] proceedings. S.Rep. No. 989, 95th Cong., 2d Sess. 14-15, 30-31 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5800-01, 5816-17 (emphasis added). Adding six months to the priority period in the case of successive bankruptcy petitions preserves this intent.

V. Conclusion

[5] The debtors' joint Chapter 13 case suspended the running of s 507(a)(7)(A)(ii)'s 240-day priority period from the date of the bankruptcy petition until six months after the case was dismissed. The IRS claims are therefore entitled to priority.

AFFIRMED.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
District of Oregon
1001 S.W. 5th Avenue, #900
Portland, Oregon 97204

August 21, 1991

Henry L. Hess, Jr.
Bankruptcy Judge

Re: Worthen - Case No. 390-33988-H13
West - Case No. 390-33989-H13

Counsel:

The court has reviewed the memoranda submitted in the above-entitled cases concerning the status of certain claims filed on behalf of the United States.

The sole issue presented to the court was whether the 240 day period mentioned in 11 U.S.C. §507(a)(7)(A)(ii) is extended by 11 U.S.C.§108(c) due to the provisions of 28 U.S.C. §6502 and §6503.

Section 108(c) of the bankruptcy code extends the time prescribed by applicable nonbankruptcy law "for commencing or continuing a civil action ... against the debtor ... ." The time for commencing a civil action against the debtor is not, however, an issue in this case. The issue is whether the claims in question are entitled to priority under the bankruptcy code. The question of priority of the claims under applicable bankruptcy law is completely separate from and unrelated to the question of

whether collection efforts on the claims would be barred by applicable nonbankruptcy law. If collection of the claims were barred by the applicable nonbankruptcy statutes of limitations, the claims would be disallowed in full and the issue of priority would not arise. Whether a claim is time-barred under nonbankruptcy law simply does not address the issue of whether, assuming the claim is not time-barred and is otherwise valid, it is entitled to priority under 11 U.S.C. §507. The court therefore concludes that the provisions of 11 U.S.C. §108(c) do not affect the 240 day period used in determining priorities under 11 U.S.C. §507(a)(7)(A)(ii).

In its memorandum, the government stated: "If the filing of a [bankruptcy] petition deprives the I.R.S. of three years to assess or 240 days to collect, then its claim is entitled to priority status." United States' Memorandum, pp. 405. In this case, as the court stated in its March 4, 1991 letter to counsel concerning whether the dismissal and refiling of these cases constituted "bad faith: "It is undisputed that the IRS has had at least 240 days after assessment to collect on its claim.: Thus, the government has not been deprived of the 240 day period. Accordingly, the objection of the United States will be overruled.

The debtors' attorneys are hereby directed to present an order overruling the objection and to promptly inform the court whether it is now appropriate for the court to schedule an adjourned confirmation hearing in these cases.

Henry L. Hess, Jr.
Bankruptcy Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35286

Beverly Dell West,
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

No. 92-35293

Robert Wesley Worthen
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

Appeals from the United States District Court
for the District of Oregon
No. CV-92-60-FR
No. CV-92-59-FR

JUDGMENT

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered September 21, 1993

A true Copy:

Attest

_____

Deputy Clerk of the United States
Court of Appeals for the Ninth Circuit

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35286

Beverly Dell West,
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

No. 92-35293

Robert Wesley Worthen
Debtor-Appellant,
v.
UNITED STATES of America, *Appellee.*

Appeals from the United States District Court
for the District of Oregon
No. CV-92-60-FR
No. CV-92-59-FR

ORDER

Before: Browning, Schroeder, and Hall, *Circuit Judges.*

Having been reviewed by the Court, Appellants' petition for rehearing is hereby DENIED.

Filed: November 12, 1993

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2070

Fred August Quenzer and Jamie Quenzer,
Debtors.

Fred August Quenzer and Jamie Quenzer,
Appellants,

v.

UNITED STATES Of America, *Appellee.*

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 905)

Before Politz, *Chief Judge*, and Higginbotham, *Circuit Judge*, and Davidson, *District Judge*.

Politz, Chief Judge:*

---

* 'District Judge of the Northern District of Mississippi, sitting by designation.

"Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Fred August Quenzer and Jamie Quenzer appeal an adverse summary judgment affirming a ruling by the bankruptcy court that certain taxes, penalties, and interest were not discharged. Concluding that the government's action is time barred we reverse and render judgment in favor of the Quenzers.

Background

The essential facts are not in dispute. In September 1986 the Quenzers filed a Chapter 13 petition which was converted to a Chapter 7 and voluntarily dismissed in March 1988. In March 1990 they filed a Chapter 7 petition in bankruptcy and their discharge was entered in July 1990.

The instant dispute involves the dischargeability of the Quenzers' 1984 and 1985 tax return liability. The record reflects stipulations regarding all other tax, interest, and penalty claims.[1] The bankruptcy court found all assessments and penalties nondischargeable. On the appeal to the district court the government conceded that the penalties and interest thereon for the 1984 and 1985 returns were dischargeable. The district court inadvertently overlooked this and ruled that these were nondischargeable. The government candidly concedes that these penalties, and the interest thereon, and

---

[1] In the bankruptcy court the parties stipulated that: (1) all tax, interest, and penalties for 1979 and 1980 were dischargeable; (2) the tax return assessments for 1981-1983 were dischargeable; (3) the audit deficiency assessments for 1981-1984 were not dischargeable; and (4) the penalties and interest on penalties based upon the return assessments for 1981-1983 were dischargeable.

dischargeable as arising from events occurring more than three years prior to the filing of the subject petitions. 11 U.S.C. §523(a)(7).

Analysis

This appeal focuses on the tax deficiencies for 1984 and 1985. In the district court the government successfully relied on the suspension provision in section 108(c) of the Bankruptcy Code as the basis for tolling the priority period for the collection of taxes during the prior bankruptcy proceedings. Under the plain language of section 108(c), however, that suspension applies only to nonbankruptcy law and nonbankruptcy proceedings. Absent some other basis for tolling the section 507 time limit, the Quenzers' tax liability for the years 1984 and 1985 must be discharged.

In apparent recognition that the plain language of 11 U.S.C. §§507 and 108(c) gives no support to the rulings a' quo, the government urges us to exercise the equitable tolling powers granted by section 105(a) of the Bankruptcy Code and extend the period for its collection efforts. In support of this suggestion the government invites our review of Dandridge v. Williams,[2] which holds that a prevailing party may urge legal grounds for a ruling that were not relied on by the trial court. A close reading of Dandridge reflects that the arguments presented to the Supreme Court had been "fully argued . . . in the district court."[3] That is not the case herein.

---

[2] 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

[3] 397 U.S. at 475 n.6.

Typically, we will not consider on appeal matters not presented to the trial court.[4] The Supreme Court recently "decline[d] to consider §105(a)" of the Bankruptcy Code because it was raised in disregard of the fabric of this rubric.[5] This principle applies with even more force when we address questions of the proper exercise of the equitable powers of the court, either inherent or statutorily granted.

Equitable considerations are largely fact-driven. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."[6] Full development and examination of the facts and the relative positions of the parties are imperative in the exercise of the court's equitable powers. Necessarily, "[i]n shaping equity decrees the trial court is vested with broad discretionary power; appellate review is correspondingly narrow."[7] Determining equities in the first instance is seldom fit grist for the appellate mill.

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[4] *See Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed.2d 826, 837, 96 S.Ct. 2868 (1976); *In re Gilchrist*, 891 F.2d 559, 561 (5th Cir. 1990).

[5] In *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649 (1992), a debtor suggested equitable tolling under section 105(a) for the first time in his opening brief to the Court. The issue was not properly before the Court since it was not raised in a lower court and was not set forth in the petition for certiorari. *Id.*

[6] *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (Douglas, J.).

[7] *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

The record before us is devoid of any factual findings by the bankruptcy or district courts which would justify the exercise of equitable powers to extend the time for the government's tax collection efforts. We decline, therefore, the government's invitation that we base an affirmance thereon.

The judgement of the district court is REVERSED and judgment in favor of the Quenzers is RENDERED declaring the questioned taxes, interests, and penalties to be discharged in bankruptcy.

Supreme Court, U.S.
FILED
APR 15 1994
CLERK

(2)

No. 93-1310

In the Supreme Court of the United States

OCTOBER TERM, 1993

BEVERLY DELL WEST AND ROBERT WESLEY WORTHEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the 240-day priority period set forth in Section 507(a)(7)(A)(ii) of the Bankruptcy Code is suspended during the pendency of a bankruptcy proceeding and for six months after its voluntary dismissal.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1310

BEVERLY DELL WEST AND ROBERT WESLEY WORTHEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 5 F.3d 423. The opinions of the district court are reported at 137 B.R. 1012 and 137 B.R. 1016. The opinion of the bankruptcy court (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on September 21, 1993. A petition for rehearing was denied on November 12, 1993. Pet. App. 15a. The petition for a writ of certiorari was filed on February 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On June 13, 1988, the Internal Revenue Service assessed income taxes for the years 1982 through 1984 against petitioners. Two hundred and twenty days later, on January 19, 1989, petitioners filed a joint petition under Chapter 13 of the Bankruptcy Code. The IRS filed a proof of claim in that proceeding for petitioners' unpaid tax liabilities. On petitioners' motion, however, the joint Chapter 13 case was dismissed on May 30, 1990. Pet. App. 2a.

b. Petitioners then obtained a divorce. On July 27, 1990, 58 days after dismissing their joint case, petitioners filed separate, individual Chapter 13 petitions. The IRS again filed proofs of claim listing the unpaid taxes for 1982, 1983, and 1984 as "unsecured [priority] claims" pursuant to Section 507(a)(7)(A)(ii) of the Bankruptcy Code (Pet. App. 2a). Under that provision, claims for taxes "assessed within 240 days * * * before the date of the filing of the petition" (11 U.S.C. 507(a)(7)(A)(ii)) are granted seventh priority.

A Chapter 13 plan must provide full payment for any claim entitled to priority under Section 507 of the Bankruptcy Code. See 11 U.S.C. 1322(a)(2). Full payment for *non*-priority unsecured claims, however, is not required under Chapter 13. Such *non*-priority claims are discharged without full payment upon completion of the plan. 11 U.S.C. 1328(a). The plans that petitioners filed in their individual Chapter 13 cases provided for partial payment of the federal tax claims, on a pro rata basis with general unsecured claims.

The government objected to the proposed plans because they did not provide full payment for the priority tax claims (Pet. App. 2a). Because the IRS assessed these taxes within 240 days before the initial, joint Chap-

ter 13 petition was filed, petitioners acknowledged that the tax claims would have been entitled to priority under Section 507(a)(7)(A)(ii) of the Bankruptcy Code in that case. Petitioners contended, however, that the taxes were no longer entitled to priority in the individual cases commenced by their second Chapter 13 petitions because 774 days had elapsed between the time of the assessment and the date on which those petitions were filed (Pet. App. 4a).

Section 108(c) of the Bankruptcy Code suspends non-bankruptcy statutes of limitations during the pendency of a bankruptcy case. 11 U.S.C. 108(c). Section 6503 of the Internal Revenue Code suspends the period of limitations on collection and assessment when a taxpayer's assets are "in the control or custody of the court * * *, and for 6 months thereafter" (26 U.S.C. 6503(b)). Relying on these provisions, the government contended that the 240-day priority period of Section 507(a)(7)(A)(ii) was suspended during the pendency of petitioners' first bankruptcy case and for six months thereafter. The government therefore argued that the 240-day priority period had not expired at the time petitioners filed their second Chapter 13 cases (Pet. App. 11a-12a).

c. The bankruptcy court rejected the government's contention. The court concluded that the suspension of the statute of limitations for the government's claim under Section 108(c) of the Bankruptcy Code had no effect on the 240-day priority period of Section 507(a)(7)(A)(ii) of the Code. The court held that the tax claims were therefore no longer entitled to priority status (Pet. App. 12a).

2. The district court reversed. *United States* v. *West*, 137 B.R. 1012 (D. Ore. 1992); *United States* v. *Worthen*, 137 B.R. 1016 (D. Ore. 1992). The court noted that, in *Brickley* v. *United States*, 70 B.R. 113 (1986), the

Bankruptcy Appellate Panel of the Ninth Circuit held that the priority period established by Section 507(a)(7)(A)(i) was suspended during the duration of the debtor's previous bankruptcy proceedings. The *Brickley* court explained that these provisions are structured to allow the IRS sufficient time to collect a debtor's taxes; permitting serial filings of bankruptcy cases to render taxes uncollectible would make the extension of the statute of limitations in Section 108(c) meaningless. 70 B.R. at 115-116. That court also noted that, if the priority periods of Section 507(a)(7)(A) ran during the pendency of a debtor's prior bankruptcy proceeding, the statutory scheme would be conducive to tax avoidance. 70 B.R. at 115-116. The district court adopted the reasoning of *Brickley* and concluded that the 240-day priority period of Section 507 was suspended during debtors' first bankruptcy case and for six months thereafter. *United States* v. *West*, 137 B.R. at 1016; *United States* v. *Worthen*, 137 B.R. at 1021.

3. On appeal, the government did not contend that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code required the conclusion that the 240-day priority period of Section 507(a)(7)(A)(ii) was tolled during the first bankruptcy case (Pet. App. 4a). Instead, the government argued that the suspension of the priority periods set forth in Section 507(a)(7)(A)(ii) was a proper exercise of the district court's equitable powers under Section 105(a) of the Bankruptcy Code, 11 U.S.C. 105(a).

The court of appeals affirmed (Pet. App. 1a-10a). The court held that this was the "rare case" in which it was necessary to go beyond the language of a statute "[b]ecause [a] literal interpretation of § 108(c) would frustrate the Bankruptcy Code's intricate scheme for the payment of tax claims" (Pet. App. 6a). The court

explained that "[i]nterpreting § 108(c) literally would allow a debtor to create an 'impenetrable refuge' by filing a bankruptcy petition, waiting for § 507(a)(7)'s priority periods to expire, and then dismissing the case and refiling shortly thereafter" (Pet. App. 7a).

The court rejected petitioners' additional argument that, even if the 240-day period was properly suspended during their first bankruptcy, the IRS's tax claims are still not entitled to priority because the IRS had 278 days after the assessment (220 days prior to the first bankruptcy case plus 58 days after the dismissal of that case and before petitioners' second bankruptcy cases) in which to collect the taxes without hindrance of a pending bankruptcy petition (Pet. App. 9a). Invoking Section 6503 of the Internal Revenue Code, the court held that the priority period should be suspended for a minimum of six months after bankruptcy. The court stated that Section 6503 and "common sense" indicate that such a period is necessary "to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so" (Pet. App. 9a-10a).

ARGUMENT

The decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 8-9, 13, 19-20) that the decision of the court of appeals unjustifiably disregards the language of Sections 108(c) and 507(a)(7)(A)(ii) of the Bankruptcy Code and Section 6503(b) of the Internal Revenue Code. Petitioners assert (i) that Section 507(a)(7)(A)(ii) "is silent regarding any tolling of the 240-day priority period during the pendency of a bankruptcy filed within that period" (Pet. 9), (ii) that Section 108(c) of the Bankruptcy Code is only applicable to extend

nonbankruptcy law limitation periods, not the priority periods found in Section 507(a)(7)(A) (Pet. 9, 19), and (iii) that, while Section 6503(b) of the Internal Revenue Code suspends the statute of limitations for collection of taxes when "the assets of the taxpayer are in the control or custody of the court * * *, and for 6 months thereafter" (26 U.S.C. 6503(b)), that provision does not refer expressly to extension of the 240-day priority period of Section 507(a)(7)(A)(ii) (Pet. 9, 20). Petitioners further claim (Pet. 13-15) that this is not one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (Pet. 13, quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)).

As the Tenth Circuit correctly concluded in *Richards* v. *United States*, 994 F.2d 763 (1993), these statutory provisions are instructive, but not controlling. The authority to suspend the 240-day priority period of Section 507(a)(7)(A))(ii) stems instead from a different statutory provision, Section 105(a) of the Bankruptcy Code. See 994 F.2d at 765. That Section provides bankruptcy courts with the authority to issue orders "necessary or appropriate to carry out the provisions [of the Bankruptcy Code,] * * * to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). Applying Section 105(a) in *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990), this Court noted the "traditional understanding" that bankruptcy courts are courts of equity. See also *Pepper* v. *Litton*, 308 U.S. 295, 303-304 (1939). The district court orders in this case—suspending the 240-day priority period of Section 507(a)(7)(A)(ii) during petitioners' first bankruptcy case and for six months thereafter—represent an appropriate application of the established equitable tolling rule that suspends the running of a

party's rights during the period that the party is disabled from exercising a legal remedy. See, *e.g.*, *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-451 (7th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991); 51 Am. Jur. 2d *Limitation of Actions* § 140 (1970).

The suspension also fulfilled the evident statutory design of affording the government a reasonable time to pursue collection efforts and of preventing debtors from escaping liability by shielding their assets in bankruptcy. *Richards* v. *United States*, 994 F.2d at 765. See S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978) ("the tax collector * * * should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting"); S. Rep. No. 1158, 89th Cong., 2d Sess. 3 (1966) (excepting priority taxes from discharge would "discourage recourse to bankruptcy as a facile device for evading tax obligations").[1]

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[1] Contrary to petitioners' contention, application of the equitable power of Section 105(a) to suspend the priority periods of Section 507(a)(7)(A) does not "disregard and override the clear and unambiguous statutory language found within the Bankruptcy Code" (Pet. 11). Nothing in the Bankruptcy Code precludes a bankruptcy court, as a court of equity administering equitable principles, from preventing tax evasion by suspending the priority periods of Section 507(a)(7)(A). As the court noted in *Richards* v. *United States*, 994 F.2d at 765, "[t]his use of the equitable authority in 11 U.S.C. § 105(a) is not inconsistent with any specific provision of the Bankruptcy Code, and * * * is consistent with the underlying philosophy of the Bankruptcy Code."

Nor does this use of equitable power "prejudice the debtors for serial filings in complete derogation of § 349(a)," as petitioners contend (Pet. 11). The decision of the court of appeals does not purport to prohibit serial filings. It merely prevents petitioners from escaping their tax liabilities by temporarily sheltering their assets in bankruptcy.

During the initial, joint bankruptcy proceeding, the government was prevented by the automatic stay of 11 U.S.C. 362(a) from collecting petitioners' tax liabilities.[2] The suspension of the 240-day period during petitioners' joint Chapter 13 case ensured that the fixed tax collection period provided to the government did not expire while debtors' assets were protected from collection. Section 6503 of the Internal Revenue Code provides an additional six months for collection of a debtor's taxes after a bankruptcy proceeding is dismissed. 26 U.S.C. 6503. Allowing that same six-month period in the comparable context of this case ensures that the government is not deprived of the full period Congress granted to pursue collection remedies. As the court of appeals noted, this additional period is necessary "to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so" (Pet. App. 10a).

For these reasons, the reported decisions of the courts of appeals have consistently concluded that the priority periods set forth in Section 507(a)(7)(A) are suspended during a debtor's prior bankruptcy proceeding.[3] As the

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[2] The filing of a petition for relief in bankruptcy operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" (11 U.S.C. 362(a)(6)). The stay remains in effect until the case is closed or dismissed, or a discharge is granted or denied.

[3] See, *e.g.*, *Richards* v. *United States*, 994 F.2d at 765 (240-day priority period of Section 507(a)(7)(A)(ii) is tolled during debtor's prior bankruptcy case); *Montoya* v. *United States*, 965 F.2d 554 (7th Cir. 1992) (three-year priority period of Section 507(a)(7)(A)(i) is tolled during pendency of prior bankruptcy while IRS was prevented from pursuing collection). See also *In re Bowling*, 147 B.R. 383 (Bankr. E.D. Va. 1992); *Linder* v. *United States*, 139 B.R. 950 (D. Colo. 1992); *Stoll* v. *Internal Revenue Service*, 132 B.R. 782, 785-786 (Bankr. N.D. Ga. 1990); *In re Ross*, 130 B.R. 312, 313 (Bankr. D. Neb. 1991); *In re Wise*, 127 B.R. 20, 23 (Bankr. E.D.

district court observed in *Molina* v. *United States*, 99 B.R. 792 (S.D. Ohio 1988), "Congress did not intend for a taxpayer to be able to escape liability by protecting assets in a bankruptcy proceeding until the statute of limitations expired." *Id.* at 795.

2. Contrary to petitioners' contention (Pet. 9-13), the decision in this case does not conflict with *Richards* v. *United States*, *supra*, or with the unpublished opinion of the Fifth Circuit in *Quenzer* v. *United States*, No. 93-2070 (Nov. 30, 1993). In those cases, as here, the government acknowledged that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503(b) of the Internal Revenue Code did not toll the priority periods of Section 507(a)(7)(A). The government contended instead that suspension of the priority periods was a proper exercise of the court's authority under Section 105(a) of the Bankruptcy Code. In *Richards*, the Tenth Circuit agreed and held that "11 U.S.C. § 105(a) is broad enough to permit the Bankruptcy Court's order to suspend the 240-day assessment period in 11 U.S.C. § 507(a)(7)(A)(ii) for the time Richards was in his first bankruptcy." 994 F.2d at 765. As the court of appeals noted in this case (Pet. App. 8a), the Tenth Circuit ap-plied a different analysis in *Richards* but reached the same result.[4]

Ark. 1991); *In re Bryant*, 120 B.R. 983, 985 (Bankr. E.D. Ark. 1990); *In re Davidson*, 120 B.R. 777, 787 (Bankr. D.N.J. 1990); *United States* v. *Deitz*, 116 B.R. 792, 794 (D. Colo. 1990); *Florence* v. *Internal Revenue Service*, 115 B.R. 109, 112-113 (Bankr. S.D. Ohio 1990); *In re Quinlan*, 107 B.R. 300, 301 (Bankr. D. Colo. 1989); *Molina* v. *United States*, 99 B.R. 792, 795 (S.D. Ohio 1988); *In re Carter*, 74 B.R. 613 (Bankr. E.D. Pa. 1987); *Brickley* v. *United States*, 70 B.R. at 116.

[4] Petitioners contend (Pet. 10) that they would prevail under the holding of *Richards* because that court did not suspend the 240-day priority period for an additional six months after the first

In *Quenzer*, the Fifth Circuit declined to consider whether the priority period could be equitably suspended under Section 105(a) because the government had not raised that argument in the lower courts (Pet. App. 20a). Since the government relied exclusively on Section 105(a) on appeal, the Fifth Circuit merely adopted the government's concession that the literal terms of Sections 108, 507 and 6503 do not themselves compel the suspension of the priority period (Pet. App. 18a). The decision of the court of appeals not to publish its per curiam opinion in *Quenzer* reflects the lack of precedential significance that the panel attached to its narrow holding.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994

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bankruptcy case was dismissed. In *Richards*, however, it was not necessary for the court to extend the period of suspension for an additional six months. The suspension of the 240-day period during the time in which Richards was previously in bankruptcy was sufficient to entitle the IRS's claim to priority status in his second bankruptcy case. As a result, the court in *Richards* did not address whether the priority period should be suspended for an additional six months after the first bankruptcy case was dismissed.

[5] Rule 47.5.3 of the Rules of the Fifth Circuit provides that every opinion believed to have precedential value is to be published.